No. 14,642

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIE LEE KNIGHT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

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STATEMENT OF JURISDICTION.

The District Court had jurisdiction at the trial in this case under 18 USC Section 3231; Rule 18 of the Federal Rules of Criminal Procedure. After conviction and sentence appellant moved the District Court to correct sentence which motion was denied. Timely appeal was taken and the jurisdiction of this Court to review the order of the District Court is involved under Title 28 USC Section 2255.

STATUTES INVOLVED.

The Bogg's Act, 26 USC Section 2557(b)(1) provides:

". . . After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States Attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledged that he is such person, he shall be sentenced as prescribed in this paragraph."

STATEMENT OF FACTS.

On January 22, 1953 appellant was sentenced to five years in prison for violating 26 USC Section 2553(a). He requested, and was granted a stay of mittimus for one day to take care of various business and personal effects. During this "day of grace" appellant committed two further violations of the law by attempting to dispose of an estimated $300,000 worth of narcotics by mailing same to San Francisco. This transaction was discovered by the Bureau of Narcotics. Appellant was indicted on February 18, 1953 for violating 21 USC Section 174 and 26 USC Section 2553(a).

Being fully advised and having waived counsel, the record at the time of arraignment and plea on February 20, 1953, shows the following with respect to the contentions made here by the appellant:

"The Court. You do not? Bear in mind as you say that, that it is possible, in fact it is more than possible, that if you stand convicted of these offenses, you will be, under the Bogg's Act, a second offender. You know what that means? That means there is a certain mandatory minimum sentence, and no possibility of probation.

The Defendant. Yes, your Honor.

The Court. You understand that?

The Defendant. Yes, sir.

The Court. All right, and understanding this, you still stand by your decision that you do not wish to have an attorney?

The Defendant. That is right, sir." (T. 33.)

* * * * * * *

"The Court. All right, then as to Count I of this indictment, what is your plea, guilty or not guilty?

The Defendanat. Guilty.

The Court. To Count II, what is your plea, guilty or not guilty ?

The Defendant. Guilty.

The Court. Very well. Let the pleas be recorded. On the basis of the pleas to Count I and Count II of this indictment, you are adjudged guilty. I have a recent pre-sentence report on you." (T. 33-34.)

* * * * * * *

"Mr. Richardson. If your Honor please, our office has been informed that he is a second of-

fender. Just to comply with the rule, we would like to make an anouncement to the Court that he will be a second offender under the Bogg's Act.

The Court. All right. I hear you, and in relation to that, I will tell you, Mr. Defendant, that if you deny being the same Willie Knight who heretofore has been tried and convicted in this Court of a narcotic offense, then the government has to do certain formal things to prove that fact. Do you deny being the same Willie Knight who has heretofore been convicted in this court?

The Defendant. I admit that I am the same." (T. 34-35.)

"The Court. I have heretofore accepted your pleas of guilty to the two counts of this indictment, and you have heretofore admitted that you are the same defendant who heretofore in this court has previously been, upon trial, convicted of a prior narcotics offense, which thus makes you a second offender in this matter. And under the Bogg's Act, no probation, of course, is possible, and would not be as a practical matter anyway, under these circumstances. You are already in confinement under a prior sentence for narcotics meted out by this court, and further the Bogg's Act for a second offender carries a mandatory minimum of five years and a maximum of ten years.

Now, in a moment, having a pre-sentence report on you and having tried your previous case, or been the presiding judge—yes, it was a jury waived case—having tried the first case, I know a good deal about you, based on that and the presentence report." (T. 35-36.)

After being accorded a full opportunity to be heard prior to sentence, the appellant was thereafter, on the same day, sentenced to ten years on each count, the sentences to run concurrently with each other but consecutively with the first sentence he was already serving for the prior narcotics conviction.

THE QUESTION PRESENTED.

The question presented is whether the failure to file a written information pursuant to 26 USC Section 2557(b)(1) renders the sentence given under that section illegal and excessive.

SUMMARY OF THE ARGUMENT.

Failure to file the written information pursuant to 26 USC Section 2557(b)(1) did not render the sentence given under that section illegal and excessive. The failure to file an information used for purposes of establishing that defendant is a second or third offender is a technical defect in a procedural matter and appellant was not injured in any way by the omission to file a written information.

An appellant can gain nothing by having the sentence set aside. He may clearly be re-sentenced.

ARGUMENT.

Appellant alleges that no written information was filed by the United States Attorney as required by 26 USC Section 2557(b)(1), the Bogg's Act, and that therefore the sentence given under that statute is illegal and excessive. He further alleges that an information cannot now be filed by the United States Attorney, as it would be a denial of due process, and that his sentence should be corrected to a five year term.

There was no written information filed by the United States Attorney as should have been done pursuant to statute. However, the information required by 26 USC Section 2557(b)(1) is not of the usual technical legal type used to institute a criminal action. Its function is not to charge the accused with a crime for which he will be prosecuted, the situation where the traditional information is used. *In Re Bonner,* 151 U.S. 242, 257 (1894). Rather it is designed to inform the Court with the seriousness of a defendant's repeated acts, to notify the defendant that he is exposed to heavy punishment, and to require the Court to inflict a severe mandatory penalty if the defendant is in fact a second offender. As stated in the legislative history of 26 USC Section 2557(b)(1), U.S. Code, Congressional and Adm. Service, 82nd Congress, First Session 1951, Vol. 2, p. 2602, "The purpose of the bill is to make more stringent and more uniform the penalties which would be imposed." Because of the severity of the mandatory sentences involved, procedural safeguards were de-

vised to protect the accused. The defendant can have a jury trial to determine his identity as a second offender—not to determine if he is guilty of a distinct crime.

The information required by statute is thus one that should be interpreted in the ordinary dictionary sense of the word: to simply inform the Court and defendant of a fact to be taken into consideration for sentencing purposes. In the present case the appellant readily admitted, in pleading, that he was a second narcotics offender and factually within the confines of 26 USC Section 2557(b)(1). The sole basis of his claim is that a technical defect voided his sentence.

Appellant's appeal is based solely upon a technical defect which does not involve any "substantial right".

It is true that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal. *Bozza v. U. S.,* 330 U.S. 160 (1947); in a similar vein, *Reynolds v. U. S.,* 98 U.S. 145, 168-169 (1878). The basis of these decisions however is that a defendant would be injured if this were not done. Here, however, the letter of the law as to his sentence was followed; the technical defect occurred in a procedural matter prior to the actual sentencing.

Rule 52 of the Federal Rules of Criminal Procedure provides that errors which do not affect substantial rights shall be disregarded. Appellant's rights were in no way impaired by the failure to file a writ-

ten information. He admitted being a second offender in the same Court in the same district and before the same judge, who found him guilty of his first offense just one month before his second conviction. The Bogg's Act provision under consideration is intended to protect the narcotics defendant convicted whose name or alias is identical to the name of a like defendant convicted in the substantial past in a different district, or recently in the same but busy district before a different judge of a multiple judge Court, or before the same but excessively busy judge in a metropolitan area. Here the appellant knew, the government knew, and the judge knew to the point of absolute certainty, that the appellant was a second offender. This the appellant freely admitted again and again prior to being sentenced.

Appellant's complaint is analogous to the complaints made by those who were sentenced only to imprisonment under a statute that requires imprisonment and a fine. The objection raised was that because of this technical defect the sentence was void. This objection has been consistently refused by the Courts. *Bartholemew v. U. S.,* 177 Fed. 902 (6 Cir. 1910), cert. denied 217 U.S. 608; *Cook v. U. S.,* 171 F. (2d) 567 (1 Cir. 1948); *Jordan v. U. S.,* 60 F. (2d) 4 (4 Cir. 1932); *Nancy, et al. v. U. S.,* 16 F. (2d) 872 (9 Cir. 1926). The reasoning in these cases is that the defendant was not harmed by the technical defect and that the "complaint in that regard is absurd." *Bartholomew v. U. S., supra.* This same

theory is applicable here. The technical defect involved, where measured against the facts of the case, does not warrant setting the sentence aside and bringing the appellant once again before the District Court for re-sentencing. As stated before, the appellant was not harmed in any way.

Appellant claims to have two authorities favorable to his point of view: *Loyola v. U. S.,* (DC Michigan, 1954), and *Baldwin v. U. S.,* (DC Ohio, 1953), both unreported. The Department of Justice has been unable to locate any record of the *Loyola* case either in Washington, D. C. or in the office of the United States Attorney at Detroit, Michigan.

In the *Baldwin* case the defendant plead guilty to an information charging him with possession of marihuana cigarettes without having paid the transfer tax thereon. Before sentence was pronounced, in response to a question by the Court, defendant said he had been convicted on two prior cases. The record does not disclose the nature of those convictions. Nine days later the United States Attorney filed a written information setting forth prior convictions of petitioner for offenses punishable under Title 26, USC Section 2557(b)(1). Petitioner did not have an opportunity in open Court to affirm or deny that he was identical with the person named in the information filed nine days after sentence. Held: There was nothing in the record at the time sentence was imposed to disclose that petitioner had committed two prior offenses punishable under Title 26, USC Section 2557(b)(1).

The *Baldwin* case is clearly distinguishable from the instant case. In *Baldwin,* defendant was not made aware of the prior offenses he was alleged to have committed nor was he given an opportunity to affirm or deny that he was identical with the person convicted of those offenses. In the instant case appellant was clearly aware of the prior narcotics conviction which the Court was informed he had committed. He then freely admitted that he was identical with the defendant of the prior narcotics conviction.

The Bogg's Act affords a defendant certain safeguards prior to imposing a penalty for second and third offenders. It requires that a defendant be made aware of the prior conviction which is attributed to him and allows him to litigate the question of identity. Here appellant was fully informed of the consequence of admitting identity. He knew which prior conviction the government attorney was referring to. He discussed certain details thereof at some length with the judge. (T. 38-48.) He freely admitted being identical with the defendant convicted just a month before in the same Court and before the same judge. Under the circumstances there is no substantial right of appellant involved which has been adversely affected.

The appellant cannot gain anything by having his prior sentence declared illegal. His allegation that he cannot be re-sentenced because of due process is not so. *Bozza v. U. S., supra; In Re Bonner, supra; White v. Hunter,* 76 F. Supp. 954 (D. Kansas 1948); *Wilson v. Bell,* 137 F. (2d) 716 (6 Cir. 1943).

CONCLUSION.

The order of the District Court is correct and should be affirmed.

Dated, Honolulu, T. H.,
March 1, 1955.

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